No. 90-6626

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In The

Supreme Court Of The United States

OCTOBER TERM, 1990

JOHN J. McCARTHY,
Petitioner,

v.

GEORGE BRONSON, WARDEN, ET AL.,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether 28 U.S.C. § 636(b)(1)(B), which authorizes a district court to refer, without the parties' consent, to a magistrate for recommended findings a prisoner petition that challenges "conditions of confinement," applies to cases challenging a specific episode of allegedly unconstitutional conduct rather than continuing prison conditions.

PARTIES TO THE PROCEEDINGS

The petitioner named in the caption, John J. McCarthy, was the plaintiff in the district court and the appellant in the Court of Appeals below. In addition to the respondent named in the caption, George Bronson, Warden, additional respondents are Steven A. Tozier, Fred Mickiewicz and Paul Lusa. These respondents were defendants in the district court and appellees in the Court of Appeals below.

Additional respondents, who are defendants pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, are the current Commissioner of the Connecticut Department of Correction, Larry Meachum, and the current Warden of the Connecticut Correctional Institution at Somers, Lawrence Tilghman.

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BRIEF FOR RESPONDENTS

STATUTORY PROVISIONS

The relevant statutory provisions, 28 U.S.C. §§ 636(b) and (c)(1), are set forth in full as an appendix to this brief. (App., *infra*, 1A). Seventh Amendment rights are not at issue in this case.[1]

[1] The Court of Appeals held that the signed consent form of February 28, 1985 constituted a valid waiver to a jury trial. J.A. 59, at 67 69; 906 F.2d 835, at 841. The waiver is not part of the question on which the Court granted certiorari, and the petitioner concedes the jury issue is not before the Court. Pet. Br. at 10, n.7. To the extent petitioner contends that the Seventh Amendment is related to the question certified, the respondents' arguments may be found *infra* at 8, 18-22.

STATEMENT

This prisoner civil rights action, brought pursuant to 42 U.S.C. § 1983, alleged excessive force by state correctional officers in violation of the Eighth and Fourteenth Amendments. J.A. 21-22. Specifically, John J. McCarthy,[2] the petitioner, alleged that the Connecticut Correctional Institution at Somers ("CCIS") lacked adequate policies and procedures to control the use of tear gas and that prison officials improperly used tear gas to remove him from his prison cell in July 1982. J.A. 13-19.

1. *Factual Background.* The facts of this "fairly straightforward section 1983 suit"[3] are not challenged, Pet. Br. 10, n.7, and are set forth in full in the district court's findings of fact. J.A. 34-45. They can be summarized as follows:

On July 13, 1982, McCarthy was incarcerated at CCIS and was assigned to cell F-36, the last cell at the end of death row. Referred to as the "death cell" and separated from the other cells in the segregation unit by a wall with a door, it was used to isolate the most difficult prisoners if they posed a threat or caused a disruption. At approximately 9:00 A.M. on July 13, 1982, Lt. Steven Tozier, the director of the Special Offenders Program, which included the segregation unit, notified McCarthy that he would be moving that day to another cell in administrative segregation. J.A. 34.

At that time, there were administrative directives in effect authorizing the use of force and chemical weapons against inmates in prescribed circumstances. J.A. 42-45. Then, as now, under these directives, prior to the use of any force, correctional officers must wait for a supervisor to arrive on the scene and must first use all reasonable verbal means to ask an inmate to come out of his cell voluntarily. J.A. 36-37. CCIS policy further provides that when deciding whether to use tear gas, a supervisor must consider a number of factors, including: (i) the potentially assaultive and aggressive nature of the inmate, (ii) whether the inmate is refusing to come out of his cell, and (iii) whether the inmate is threatening the officers with physical harm. J.A. 42. Tear gas may be used when correction officers have to remove an inmate from an area which the inmate controls or when there are barriers which would prevent the officers from using mace and would place the officers at risk upon entering the cell. J.A. 42-43. All of the prerequisites for the use of tear gas were met in this case.

When Lt. Tozier arrived, he was informed that McCarthy had refused to come out of his cell, had tied the cell door shut, jammed his lock, and was in an angry, agitated state. The officers met with Lt. Tozier and discussed a "game plan" for getting McCarthy to leave his cell. It was decided that the officers would first ask McCarthy to come out of his cell voluntarily and then issue an order if necessary. If refused, the officers would enter the cell and remove McCarthy. J.A. 36-37. The officers asked McCarthy to come out peacefully and spent approximately ten to fifteen minutes trying to coax him out of his cell. J.A. 37. McCarthy refused to leave the cell and stood holding the mattress from the bed and threatening the officers. McCarthy told the officers "You will have to come in and get me," and, "Someone is going to get hurt." J.A. 36-37.

As director of the Special Offender Program, Lt. Tozier had reviewed McCarthy's misconduct record and was aware that he had received approximately fifteen misconduct reports, including reports for possession of drugs and intoxicating substances and possession of a weapon. J.A. 44. Lt. Tozier was a shift supervisor and was authorized by CCIS policy to order the use of tear gas. J.A. 34-35. On Lt. Tozier's order, Officer Paul Lusa operated the tear gas duster on that

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[2] The petitioner, John J. McCarthy, (hereinafter "McCarthy" or "petitioner"), is a Connecticut state prisoner, presently incarcerated in the United States Penitentiary, Leavenworth, Kansas, subject to return to Connecticut correctional facilities at any time in the discretion of state or federal prison officials.

[3] J.A. 67; 906 F.2d at 840.

day. He approached McCarthy's cell door and placed the tear gas duster on the cell bars. Officer Lusa was the hallkeeper and had on many occasions responded to various prison emergencies including situations that involved moving inmates. He had substantial experience with the tear gas duster and had used it on numerous occasions prior to July 13, 1982. J.A. 37.

When McCarthy saw the duster, he used the mattress to shield himself and did not leave. Suddenly, McCarthy lunged toward a specific area of his cell. Believing that McCarthy was lunging for a weapon, Officer Lusa deployed the tear gas duster, at the command of the supervisor, and sprayed it for about three seconds. J.A. 37, 45. This gave the officers enough time to gain control of McCarthy safely, without having to use bodily force or engage in a physical struggle. J.A. 38. A ten-inch shank or homemade knife was subsequently found among McCarthy's personal property in his cell. J.A. 39-40. Use of the tear gas duster avoided injury to both the officers and McCarthy, and under the circumstances, was authorized pursuant to CCIS policy. J.A. 45.

2. *Proceedings in the District Court.* On April 11, 1983, McCarthy brought suit pursuant to 42 U.S.C. § 1983, seeking money damages and injunctive relief "to correct useage" [sic] of tear gas in the prison. J.A. 3-6. McCarthy alleged that the use of tear gas against him on July 13, 1982, constituted excessive force and that there were unconstitutional deficiencies in prison policies relating to the use of tear gas in general. J.A. 11-24. McCarthy sought damages and an order enjoining the use of tear gas and requiring the defendants to "formulate and adopt rigid Directives restricting the use of Tear Gas . . ." J.A. 23; *see also* J.A. 6, 9, 11-24. His complaint did not request a jury trial.[4]

[4] He amended his complaint twice. The second amended complaint, filed over two years after the initial complaint, requested a jury trial for the first time. J.A. 11-24. The magistrate, however, denied petitioner leave to file a jury demand, because he had already consented to a court trial under 28 U.S.C. § 636(c). J.A. 28-29, 61, 67-69; R. certified docket sheet filing #28 (D. Conn. June 10, 1985).

On February 28, 1985, McCarthy signed a consent form agreeing to have the case tried before a magistrate pursuant to 28 U.S.C. § 636(c). J.A. 7. However, on March 24, 1988, the first day of the trial before the magistrate, McCarthy refused to sign a second consent form, stating that he preferred to have the case heard by the district judge. Although not required to do so, the magistrate permitted McCarthy to withdraw his consent, and over his objection, proceeded to hear the case as "recommended fact-finder," with the district judge to make the final determination after de novo review. J.A. 30-32. The district judge, after considering McCarthy's objections and pending motions, approved the magistrate's findings and recommendations, and entered judgment for the defendants. J.A. 52-58.

3. *Proceedings In The Court Of Appeals.* In his appeal, McCarthy challenged, *inter alia*, "procedural irregularities concerning the reference to the Magistrate." J.A. 59, 906 F.2d at 837. The Court of Appeals concluded that the magistrate had properly "used the authority of subsection 636(b)(1)(B) to conduct a hearing and recommend proposed findings of fact concerning 'prisoner petitions challenging conditions of confinement.'" J.A. 64, 906 F.2d at 839. The Court held:

> With complete propriety, [the Magistrate] could have declined to vacate the 636(c) consent and adjudicated the merits definitively. He was surely entitled to take the lesser step of hearing the evidence and submitting recommended findings to the District Judge. The parties' consent is not required for using that procedure, and it is obvious, from the District Judge's subsequent approval of the Magistrate's findings, that the Judge welcomed the Magistrate's help.

J.A. 64; 906 F.2d at 839.

The Court affirmed the District Court's decision that the McCarthy lawsuit was a petition "challenging conditions of confinement" within the meaning of § 636(b)(1)(B), even

though it involved a specific episode of alleged misconduct. J.A. 65; 906 F.2d at 839.

> We see no reason why a Magistrate with clear authority to hold hearings and recommend findings as to the unconstitutionality of continuing prison conditions may not perform a similar function as to specific episodes of unconstitutional conduct by prison officials.

Id. McCarthy's petition for a rehearing was denied on August 6, 1990. J.A. 71.

On August 21, 1990, the petitioner filed his *pro se* petition for a writ of certiorari. On December 10, 1990, this Court granted his motion to proceed *in forma pauperis* and granted the petition for a writ of certiorari. J.A. 72.

SUMMARY OF ARGUMENT

The issue before the Court in this case is whether a specific episode of allegedly unconstitutional conduct is a "condition of confinement" within the meaning of 28 U.S.C. § 636(b)(1)(B). The Court of Appeals below correctly concluded that the phrase "conditions of confinement" includes specific episodes, and its decision should be affirmed. *See* J.A. 63-66; 906 F.2d at 838-39.

The essence of petitioner's argument is that, to be consistent with the Seventh Amendment, Congress must have intended to limit the term "conditions of confinement" to cases alleging ongoing, pervasive practices and seeking injunctive relief only, so that the right to a trial by jury would never be implicated. This interpretation contravenes both the language and legislative history of the statute and goes well beyond what is necessary to avoid constitutional conflict.

1. The limitations that the petitioner asks this Court to place on the term "conditions of confinement" are found nowhere in 28 U.S.C. § 636(b)(1)(B) and do not flow logically from the language or structure of the statute. The Court of Appeals reasonably and properly concluded that "[t]he phrase 'conditions of confinement' appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement." J.A. 65-66; 906 F.2d 839 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973) and legislative history of § 636(b)). This approach makes common sense, provides clarity and predictability to district judges, and avoids rewriting the statutory language chosen by Congress.

2. The interpretation of the court below is amply supported by the legislative history as well as the text of the Federal Magistrates Act. In enacting the 1976 amendments to the Federal Magistrates Act of 1968,[5] Congress autho-

[5] Act of Oct. 21, 1976, Pub. L. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b)). *See* Appendix, *infra*.

rized magistrates to conduct evidentiary hearings with respect to two broad categories of prisoner claims, "applications for posttrial relief" and "prisoner petitions challenging conditions of confinement." Congress used expansive terms in attempting to describe the universe of prisoner claims that a district judge may refer under § 636(b)(1)(B) to a magistrate for "proposed findings and recommendations." Congress clearly intended to broaden the use of magistrates and ease the burden on judges. *See United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980). Affirming the decision below will advance Congress's goal of reducing the backlog of prisoner cases clogging the district courts and providing district judges with discretion to use magistrates to increase judicial efficiency and effectiveness. *See* S. Rep. No. 625, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 4 (1976).

3. There is no need for this Court to rewrite the Federal Magistrates Act to avoid a conflict with the Seventh Amendment. In this case, petitioner indisputably waived his right to a jury trial and the reference to a magistrate therefore did not infringe the Seventh Amendment. Had petitioner properly asserted and preserved his right to a jury trial, the magistrate could not have proceeded under § 636(b)(1)(B). Petitioner, however, seeks to exempt from the statute every prison claim involving a specific episode of misconduct, including cases in which there is no jury trial right because the prisoner seeks only equitable relief, has chosen not to seek a jury trial, or has waived his right to a jury trial. Under this construction of the statute, a prisoner without a jury trial right could nonetheless block the referral of his case to a magistrate, frustrating Congress's intent to give broad authority to magistrates to hear prisoner petitions. It would remove from the magistrate's purview a much larger category of cases than is necessary to avoid Seventh Amendment problems.

4. The balance of authority holds only that § 636(b)(1)(B) does not authorize a magistrate to try a case in which a jury

trial has been properly claimed, not that § 636(b)(1)(B) must be construed to preclude all single episode prisoner claims. *See, e.g., Hall v. Sharpe*, 812 F.2d 644 (11th Cir. 1987); *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc). Even in *Hill v. Jenkins*, 603 F.2d 126 (7th Cir. 1979), in which Judge Swygert's concurrence offered the definition of "conditions of confinement" that petitioner now advances, the majority did not accept that definition, but held instead that the magistrate could not conduct a nonconsensual civil trial under § 636(b). In the case most analogous to this one, *Branch v. Martin*, 886 F.2d 1043 (8th Cir. 1989), the court referred a prisoner petition alleging a specific episode of excessive force to a magistrate under § 636(b)(1)(B). Other courts have also referred specific episode cases without commenting on the "conditions of confinement" issue. *See* p. 23, n.24, *infra*.

5. Petitioner's construction of § 636(b)(1)(B) would create an unworkable statutory scheme and unnecessarily burden district judges. Whether a claim involves "ongoing" or "continuing" practices, as opposed to a "specific episode," will often be unclear—especially where, as in this case, a prisoner petition is based on a specific episode but the action in question was taken pursuant to a continuing prison policy that is challenged. If, as petitioner suggests, the reference to a magistrate under § 636(b) raises a jurisdictional question, *see Clark v. Poulton*, 914 F.2d 1426 (10th Cir. 1990) (amended petition for rehearing with suggestion for rehearing en banc filed, Nov. 6, 1990), judges would need to conduct a preliminary inquiry merely to determine which judicial officer, judge or magistrate, has jurisdiction to hear the case. Adopting petitioner's interpretation would clearly increase the caseload of federal district judges, who could not refer to a magistrate any prisoner case found to challenge a specific episode of misconduct. In addition, under petitioner's approach, magistrates would handle primarily class actions and sweeping challenges to prison conditions, (*see* Pet. Br. 26-27), while federal judges would have to hear every individual case in which a prisoner complains about his treatment. These results would make make no sense and

would be contrary to the intent of Congress to give judges broader authority to refer prison cases to magistrates to help relieve their ever-increasing caseload.

ARGUMENT

I. PETITIONER'S CONSTRUCTION OF 28 U.S.C. § 636(b)(1)(B) TO EXCLUDE ALL PRISONER PETITIONS ALLEGING SPECIFIC EPISODES OF MISCONDUCT CONTRAVENES BOTH THE LANGUAGE AND LEGISLATIVE HISTORY OF THE STATUTE.

A. The Language Of § 636(b)(1)(B) Allows Reference Of All "Prisoner Petitions Challenging Conditions Of Confinement" And Plainly Does Not Exclude Challenges To Specific Episodes Or Practices.

In deciding an issue of statutory construction, the Court "must begin with the language of the statute itself." *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 580 (1982) (quoting *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980)).

Title 28 U.S.C. § 636(b)(1)(B) authorizes a district judge to refer to a magistrate for evidentiary hearings, proposed findings, and recommendations "prisoner petitions challenging conditions of confinement." Under the guise of giving this broad statutory language its "ordinary" meaning, Pet. Br. 14 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)), petitioner asks this Court to rewrite the words "conditions of confinement" to read:

> complaints concerning ongoing practices or circumstances (often embodied in a regulation) that affect prisoners, or a class of prisoners, generally and, if proven, are subject to redress by appropriate injunctive relief.

Pet. Br. 13-14.

This series of limitations proposed by petitioner can be found nowhere in the statute itself.[6] Congress placed no modifiers before the words "conditions of confinement." Petitioner asks this Court to insert the word "continuing," for example, into the phrase "conditions of confinement," but Congress plainly did not limit § 636(b)(1)(B) referrals to "prisoner petitions challenging *continuing* conditions of confinement." *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (interpreting broadly the phrase "and laws," as used in 42 U.S.C. § 1983, because Congress attached no modifiers).

Nor did Congress limit referrals under § 636(b)(1)(B) to "*purely injunctive actions* broadly challenging ongoing, pervasive conditions of confinement." Pet. Br. 19 (emphasis added). Petitioner again seeks to read into the statute language which is plainly absent. Congress placed no limitation on the magistrate's authority based on a particular remedy which may or may not be available in a particular case.[7] Many prisoner petitions are actions under 42 U.S.C. § 1983, for example, which itself expressly provides for

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[6] Petitioner's resort to the dictionary definition of "condition" does not support his position. *See Webster's Third New International Dictionary* 473 (1968) (wide variety of definitions for "condition"); *see also Random House Dictionary of the English Language* 425 (2d ed., unabridged 1987) (14 definitions for "condition" as a noun; 25 definitions overall). Even the definition selected by petitioner — an "existing state of affairs" or "mode or state of being," Pet. Br. 14 n.8 — does not lead to the conclusion that a condition of confinement must mean an ongoing or pervasive practice affecting more than one person. *See Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989) ("The term 'conditions of confinement' has been interpreted expansively to include almost any prisoner § 1983 action").

[7] Petitioner suggests that the word "petition" in § 636(b)(1)(B) indicates an equity proceeding. Pet. Br. 22, n.16. But the ordinary definition of "petition" is much broader. *See Black's Law Dictionary* 1031 (5th ed. 1979) (defining "petition" broadly, as "[a] formal written application to a court requesting judicial action on a certain matter"); *Webster's Third New International Dictionary* 1690 (1981) (petition as a "formal written request addressed to a magistrate or court praying for preliminary, incidental, or final specific relief and setting forth the facts or reasons therefor; or a complaint; or a formal statement of a cause of action addressed to a court or magistrate").

liability in both an "action at law" and a "suit in equity." Congress simply did not limit the magistrate's authority to hear "prisoner petitions challenging conditions of confinement" to those which seek injunctive relief only.[8]

Had Congress intended to restrict the scope of cases which could be referred to magistrates, it could have done so explicitly, as it has done in other statutes. For example, in the RICO Act, 18 U.S.C. § 1961 *et seq.*, Congress made unlawful various practices arising from "*a pattern* of racketeering activity," 18 U.S.C. § 1962(a) (emphasis added), and was careful to define "pattern of racketeering activity" to require "at least two acts of racketeering activity." 18 U.S.C. § 1961(5).[9] If Congress had intended to limit "conditions of confinement" to continuing or widespread practices, presumably it would have said so expressly. *Gomez v. United States*, 109 S. Ct. 2237, 2247 (1989).[10]

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[8] By contrast, in § 636(b)(1)(A) Congress expressly limited the authority of magistrates based on the nature of the relief sought. Section 636(b)(1)(A) specifically exempts eight categories of dispositive motions, including "a motion for injunctive relief," which the magistrate cannot "hear and determine" under that section. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

[9] Petitioner relies on the use of the phrase "conditions of confinement" in other statutory provisions, 42 U.S.C. §§ 1997a and 1997c, to support his interpretation of that phrase here. Pet. Br. 17. But in that statute, Congress repeatedly used the phrase "*pattern or practice*" to define the limits of the Attorney General's authority to initiate or intervene in civil actions against state officials for "*equitable relief.*" (emphasis added). These express limitations on both the type of conduct and the nature of relief under 42 U.S.C. §§ 1997a-c are plainly absent from § 636(b)(1)(B).

[10] Petitioner also relies on the use of the phrase "conditions of confinement" in other federal statutes to support his interpretation. Pet. Br. 17. But it is clear from those statutes that Congress was referring to *physical* prison conditions. *See* 42 U.S.C. § 3769 (a statute providing fiscal assistance for innovative fast-track construction of state correction facilities, which specifically refers to relieving overcrowding and substandard conditions) (42 U.S.C. § 3769a(a)(1)); 18 U.S.C. § 4013(a)(4) (authorizing Attorney General to make payments to states "for the necessary construction, physical renovation . . . required to establish acceptable conditions of confinement"). Obviously, these statutes and the Magistrates Act have very different purposes and the phrase "conditions of confinement" need not be construed to mean the same thing in § 636(b)(1)(B).

The respondents' interpretation of "conditions of confinement" to include prisoner complaints arising from specific episodes of conduct as well as ongoing, systemic conditions is further supported by a reading of the statute in its entirety. *Gomez*, 109 S. Ct. at 2241 ("in expounding on a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (additional citations omitted).

The Court of Appeals below compared the phrase "petitions challenging conditions of confinement" in § 636(b)(1)(B) with the phrase which immediately precedes it, "applications for posttrial relief made by individuals convicted of criminal offenses." J.A. 66; 906 F.2d at 839. The court reasoned that both of these phrases used by Congress were "broad categories of prisoner claims." *Id.* The phrase "applications for posttrial relief" is clearly expansive and includes proceedings other than habeas actions, such as motions to vacate sentences. Similarly, Congress chose the phrase "prisoner petitions challenging conditions of confinement," to denote all causes of action brought by prisoners relating to or arising from prison conditions, other than those seeking postconviction relief.

Relying on this Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court of Appeals correctly concluded that "[t]he phrase 'conditions of confinement' appears not to have been selected as a limitation to preclude episodes of misconduct, but rather as a generalized category covering all grievances occurring during prison confinement." J.A. 65-66; 906 F.2d at 839. *See Preiser*, 411 U.S. at 498-500 (distinguishing § 1983 prisoner civil rights actions concerning "conditions of confinement" generally from habeas actions concerning length or fact of confinement); *see also Ford v. Estelle*, 740 F.2d 374, 379 n.2 (5th Cir. 1984) (citing *Preiser* and noting that this understanding of "conditions of confinement" was "fairly current in 1976").

B. The Legislative History Of The Magistrates Act Strongly Supports A Broad Reading Of § 636(b)(1)(B).

Congress enacted the Federal Magistrates Act in 1968[11] in order to create a system of judicial officers who would assist the district judges "in handling an ever-increasing caseload." S. Rep. No. 625, 94th Cong., 2d Sess. 2 (1976) ("1976 Senate Report");[12] *See Wingo v. Wedding*, 418 U.S. 461, 462-63, 474-76 (1974). The 1968 Act authorized "additional duties" for federal magistrates, including "preliminary review of applications for posttrial relief," but did not authorize them to conduct evidentiary hearings. *Id.* at 470-472.

It was this Court's decision in *Wingo v. Wedding*, holding that magistrates could not hear and determine habeas matters under § 636(b)(3) of the 1968 Magistrates Act, 418 U.S. at 469-70, that spurred Congress to amend the Act in 1976. The amendments reformulated the "additional duties" section of the Act and added the language of § 636(b)(1)(B) that is in the statute today. 1976 Senate Report at 3; 1976 House Report at 5.

Congress, however, not only expressly authorized magistrates to conduct evidentiary hearings in habeas matters, it

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[11] Pub. L. No. 90-578, § 101, 82 Stat. 1113 (1968) (codified as amended at 28 U.S.C. § 636 (1976)). *See generally* K. Sinclair, *Practice Before Federal Magistrates*, §§ 3.03, 3.04 (1990).

[12] The House Report is in accord. *See* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162-6173 ("1976 House Report"). Commentators agree that the purpose of the Act was to broaden the authority of the magistrates and provide judges with flexibility and discretion. *See, e.g.*, Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 Ariz. St. L.J. 565; McCabe, *The Federal Magistrate Act of 1979*, 16 Harv. J. Legis. 343 (1979).

Seventeen days of hearings were held in the 93rd Congress, at which the chief judges of forty-four federal judicial districts testified about the value and importance of magistrates' assistance, particularly in handling prisoner habeas corpus petitions. *See* 1976 Senate Report at 3; 1976 House Report at 4-5.

further expanded the magistrates' authority to include a new category of "prisoner petition" cases. 1976 Senate Report at 9; 1976 House Report at 11. A stated purpose of the 1976 amendments was to authorize magistrates "to hear and recommend a disposition of certain dispositive motions, including habeas corpus proceedings and certain prisoner petitions." 1976 Senate Report at 2.[13] This was consistent with the intent of Congress to broaden the authority of magistrates to assist judges in handling an ever-increasing volume of cases. *See United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980) (noting, in construing § 636(b)(1), that "the plain objective of Congress [was] to alleviate the increasing congestion of litigation in the district courts"); *Wimmer v. Cook*, 774 F.2d 68, 71 (4th Cir. 1985) ("Each step in this growth in the jurisdiction of the magistrate was prompted by an expressed Congressional desire to reduce the burden on the federal courts caused by the tremendous increase in the caseload in those courts.") The assignment of cases to the magistrates was left to the discretion of the judges. *See* 1976 Senate Report at 9-11; 1976 House Report at 12.

There is no authority in the legislative history for distinguishing between "specific episodes" and "continuing" or "pervasive" conditions of confinement. To the contrary, the expressed purpose of Congress was to authorize magistrates to provide additional assistance to judges by broadening the categories of prisoner cases which may be referred under § 636(b)(1)(B), and by reaffirming the judges' discretion to refer prisoner petitions to magistrates.

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[13] This latter category was described twice in the reports: as "prisoner petitions brought under Section 1983 of Title 42 U.S. code," 1976 Senate Report at 4; 1976 House Report at 6; and as "petitions under section 1983 of title 42 United States Code by prisoners challenging the conditions of their confinement." 1976 Senate Report at 9; 1976 House Report at 11. The term Congress enacted in § 636(b)(1)(B), "prisoner petitions challenging conditions of confinement," is not expressly limited to actions brought under § 1983, and therefore includes *Bivens* actions brought by federal prisoners.

Petitioner's interpretation of "conditions of confinement" would contravene this congressional intent. As the dissent stated in *Clark v. Poulton*, 914 F.2d 1426, 1435 (10th Cir. 1990) (Anderson, J., dissenting), excluding "specific episodes" from the magistrate's authority under the statute would mean that:

> A suit alleging that a prisoner was beaten once must be heard by an Article III judge, but a claim that the prisoner is beaten daily may be referred to a magistrate. Limiting the magistrate's jurisdiction to the more serious claim makes no sense . . . [and this] interpretation conflicts with the legislative intention to give magistrates broad authority to assist judges. *See* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 6-8, *reprinted in* 1976 U.S. Code Cong. & Admin. News, 6162, 6166-68.

In discussing the desirability of expanding references to magistrates, the 1976 Senate and House Reports rely on statistics compiled by the Administrative Office of the United States Courts ("Administrative Office").[14] The Senate Report notes that magistrates handled 7,455 "prisoner petitions" in 1974, and the House Report notes that they handled 8,231 "prisoner petitions" in 1976. 1976 Senate Report at 5; 1976 House Report at 7. These statistics on "prisoner petitions" are not further subdivided into those arising from specific incidents and those arising from ongoing or pervasive conduct, nor into those seeking damages as opposed to injunctive or declaratory relief. In light of Congress's reliance on these statistical tables containing the general phrase "prisoner petitions," as well as Congress's avowed intent to reduce the burden on judges, it is unlikely that Congress intended to limit "prisoner petitions" under § 636(b)(1)(B) to preclude

[14] This Court has judicially recognized and relied on the statistics and interpretation of the Administrative Office of the United States Courts. *See, e.g., Mathews v. Weber*, 423 U.S. 261, 269, 272 n.7 (1976).

magistrates from hearing any and all "specific episode" cases.[15]

Petitioner contends that allowing only broad-based injunctive relief cases to be referred to magistrates would still help reduce the burden on federal judges, because magistrates could continue to handle certain complex, prison class actions. Petitioner suggests that this may be what Congress had in mind, asserting that Congress was "surely aware" of such class actions when it passed § 636(b)(1)(B) in 1976, Pet. Br. 26, but he fails to cite a single reference in the legislative history to support this assertion.

These class actions clearly were not the primary concern of Congress, and they hardly comprise a "large category" of cases, as petitioner contends. Pet. Br. 27. In the fiscal year ending June 30, 1990, there were only 135 prisoner civil rights class action cases pending nationwide in the district courts. 1990 Annual Report of the Director of the Administrative Office of the United States Courts ("Annual Report"), App. I, Table X-4. To put this number in perspective, there were 25,992 prisoner civil rights petitions in 1990, and 42,630 prisoner petitions in total that year. 1990 Annual Report, Table C-2A. It is unreasonable to assume that Congress was focusing solely on class actions and that it therefore intended to allow magistrates to handle only injunction cases challenging widespread, continuing prison practices.[16]

[15] For this Court to acknowledge that Congress intended to broaden magistrates' authority to hear prisoner petitions, and then to narrowly construe what categories of prisoner petitions they can hear, would be to "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980) (citation omitted).

[16] Moreover, even in a class action, a prisoner can seek damages as well as equitable relief. According to petitioner, a request for damages would preclude reference of the case to a magistrate. Petitioner's suggestion that the equitable claims could be severed and tried by a magistrate first (Pet. Br. 27 n.23) would be a cumbersome procedure and would result in a duplication of effort since, as petitioner concedes, the magistrate's findings could have no collateral estoppel effect in a subsequent damages action tried before a jury. *Id.*

There can be little doubt that Congress's concern about the need for magistrates to assist judges in handling prisoner petitions is more critical today than ever before. The largest increases in numbers of federal question cases over the last 30 years have been petitions filed by state prisoners. *See* 1989 Annual Report at 9. The 25,992 prisoner civil rights petitions filed in 1990 were more than double the number filed in 1980. 1990 Annual Report, App. I, Table C2. Prisoner petitions constituted approximately 20%—and prisoner civil rights cases nearly 12%—of all civil cases commenced in fiscal year 1990. *Id.* Magistrates wrote reports and recommendations and helped judges to dispose of 13,132 prisoner petitions pursuant to 28 U.S.C. § 636(b) in 1990. 1990 Annual Report, App. I, Table M-4A.

C. The Right To A Jury Trial Was Not Infringed In This Case, And Petitioner's Strained Construction Of § 636(b)(1)(B) Is Not Needed To Avoid Constitutional Conflict.

Petitioner's Seventh Amendment rights were in no way infringed, and are not now implicated in this case, because petitioner indisputably waived his right to a jury trial. *See* nn. 1, 4 *supra;* Pet. Br. 10 n.7. Petitioner nonetheless uses the Seventh Amendment as a basis for advocating a wholesale reconstruction of § 636(b)(1)(B), which would bar magistrates from hearing cases like this one. In essence, petitioner's argument is that Congress must have intended, without giving any indication of its intent, to exempt from the magistrate's authority a broad category of "specific episode" cases because a jury trial could be claimed in many of these cases.

Respondents agree that courts should not assume that Congress intended to infringe constitutional rights, and

that a statute should be construed so as to avoid constitutional conflict, if possible. *Gomez v. United States*, 109 S.Ct. 2237, 2241 (1989) (it is "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question"). *See* Pet. Br. 24, 25. Nor do respondents dispute the contention that a magistrate cannot conduct nonconsensual evidentiary hearings and make recommended findings and conclusions under § 636(b)(1)(B) when a prisoner has a right to have his case tried by a jury and has properly exercised that right under Fed. R. Civ. P. 38.

None of these propositions, however, supports petitioner's claim that magistrates are without authority under § 636(b)(1)(B) to hear any prisoner petition that involves a specific episode of misconduct, even if there is no right to a jury trial in that case. Indeed, petitioner's own case dramatically illustrates that his interpretation of the statute goes well beyond what is necessary to avoid constitutional conflict. Here, petitioner had no right to a jury trial, but insists that a magistrate could not conduct evidentiary hearings without his consent.[17]

Petitioner's case is not unique. Leaving aside the enormous difficulty of determining what constitutes a "specific episode," *see* pp. 24-27 *infra*, there simply will be no claim for a jury trial in many prisoner cases challenging a "specific episode" of misconduct. In some cases, prisoners may not want a jury trial for any number of reasons, one of which

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[17] Arguably, since the right to a jury trial is not an issue in this case, there is no need for the Court to reach this issue and construe the statute in question so as to avoid all possible Seventh Amendment problems that might arise under § 636(b)(1)(B). *See Parker v. Los Angeles*, 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.") But the very absence of a jury trial right in this case demonstrates that the broad exception that petitioner would read into § 636(b)(1)(B) is far broader than is necessary to harmonize the statute with the Seventh Amendment and counsels the Court to reject petitioner's interpretation.

may be concern that a jury may be unsympathetic to them or to their claim. In others, prisoners may not properly assert their right to a jury trial under Rule 38, or may choose to waive their right to a jury trial,[18] as happened in this case. In addition, while many "specific episode" cases will involve a claim for damages, and hence be triable by jury, there certainly may be specific episode cases in which prisoners seek equitable relief only.[19] But under the statutory scheme that petitioner imputes to Congress, every "specific episode" case must be tried by an Article III judge if the prisoner objects to a magistrate's involvement under § 636(b)(1)(B), even if he does not have, or has relinquished, the right to a jury trial.

There is no indication that Congress intended § 636(b) to operate in this way. Petitioner cites no reference in the statute's legislative history to the Seventh Amendment or the right to a jury trial,[20] and as discussed above, Congress

[18] As the Court of Appeals noted, "[c]onducting nonjury trials at the prison frequently benefits a prisoner-claimant, since witnesses and documents, needed unexpectedly, are more accessible." J.A. 61; 906 F.2d at 837. A prisoner who waives the right to a jury trial may nonetheless object, for reasons of personality, reputation or the circumstances of his case, to having a magistrate hear his case.

[19] Petitioner focuses almost exclusively on excessive force cases, which often present the most compelling damages claims. *See* Pet. Br. 19 n.13. But a prisoner denied access to a doctor, or a library, for example, may only want the access he has been denied, not damages. *See, e.g., Cooper v. Pate*, 324 F.2d 165 (7th Cir. 1963) (Black Muslim prisoner sought only Koran and certain other religious materials) *rev'd on other grounds*, 378 U.S. 546 (1964) (per curiam). Equitable relief would be available if the prisoner can show that the practice challenged is likely to recur. *See* p. 25 *infra*.

[20] Petitioner points out that the House and Senate Reports cite a case that mentions the right to a jury trial in passing in a footnote (*TPO, Inc. v. McMillen*, 460 F.2d 348, 354 n.37 (7th Cir. 1972)). Pet. Br. 25 n.21. But the Reports refer only to *TPO's* holding that magistrates couldn't decide motions to dismiss under the 1968 Act, in order to make clear that magistrates could hold hearings and recommend disposition of such motions under the new § 636(b)(1)(B). *See* 1976 Senate Report at 9; 1976 House Report at 11 ("This bill will overcome the effect of the decision in *T.P.O. v. McMillen, supra*, relating to motions to dismiss or motions for summary judgment").

intended to give broad authority to magistrates to hear prisoner cases in order to relieve the burden on federal judges. *See pp. 14-18 supra.*

Petitioner argues that the language and structure of § 636(b) suggest that Congress did not intend to authorize magistrates to conduct jury trials under § 636(b)(1)(B). Pet. Br. 20. Respondents agree. But this proposition hardly suggests that Congress meant to exclude from that section a whole category of cases involving no more than the possibility of a jury trial. In fact, Congress created a statutory structure which, in any given case, allows a prison petitioner who seeks money damages and who has a right to a jury trial to preserve that right by properly asserting it. A prisoner who does not have a jury trial right, or who has waived it, may, without his consent, have his case referred to a magistrate, but only for evidentiary hearings and proposed findings under § 636(b)(1)(B). Petitioner claims it would be "highly anomalous to assume Congress intended to authorize nonconsensual referral of single damage cases such as petitioner's." Pet. Br. 24. On the contrary, it would be anomalous to assume that Congress intended to preclude reference to a magistrate of a case in which a prisoner has no right to a jury trial.[21]

Petitioner's restructuring of § 636(b)(1)(B) to preclude a broad category of "specific episode" cases from being referred to a magistrate is unnecessary to preserve prisoners' Seventh Amendment rights, has no support in the legislative history, and undermines Congress's general purpose of broadening magistrate's authority to assist judges with prisoner cases. *See Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (Court's duty "is 'to find that interpretation which can most fairly be said to be imbedded in the statute . . . [and] most

[21] The effect of petitioner's argument is to add a consent requirement to § 636(b)(1)(B) references, even though the term "consent" does not appear in this section, as it does in § 636(c). Had Congress intended to require consent before nonjury damages actions could be referred to magistrates, it presumably would have said so explicitly, as it did in § 636(c). *Russello v. United States*, 464 U.S. 16, 23 (1983).

harmonious with ... the general purposes that Congress manifested'") (additional citations omitted).

D. The Balance Of Authority Does Not Support Petitioner's Narrow Construction of § 636(b)(1)(B).

The Courts of Appeals which have construed § 636(b)(1)(B) to exclude "specific episodes" have based their conclusion on a definition of "conditions of confinement" contained, not in the statute, but in a concurrence by Judge Swygert in *Hill v. Jenkins*, 603 F.2d 1256, 1260 (7th Cir. 1979). Judge Swygert's definition was supported by no authority. It was nonetheless followed by the Ninth Circuit, *Houghton v. Osborne*, 834 F.2d 745 (9th Cir. 1987)[22] and the Tenth Circuit in *Clark v. Poulton*, 914 F.2d 1426 (10th Cir. 1990), over strong dissent. *See Poulton*, 914 F.2d at 1434 n.1 (Anderson, J., dissenting) ("Judge Swygert's concurrence cites no authority for his narrow construction of the statute, and the cases adopting his construction cite no authority other than the concurrence and the other cases adopting it."). *See also Houghton*, 834 F.2d at 751 (Goodwin, J., dissenting). Notably, the majority in *Hill v. Jenkins* did not accept Judge Swygert's definition, instead ruling, *inter alia*, that the magistrate could not conduct a nonconsensual civil trial under § 636(b). 603 F.2d at 1258.[23]

Most of the other cases cited by petitioner similarly stand solely for the proposition that magistrates cannot conduct trials in jury cases under § 636(b)(1)(B). For example, in *Hall v. Sharpe*, 812 F.2d 644 (11th Cir. 1987); *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc) and *Wimmer v. Cook*, 774 F.2d 68 (4th Cir. 1985), the courts all held that a magistrate could not conduct a nonconsensual jury trial under § 636(b)(1)(B) when a jury trial had been demanded. None of these decisions interprets § 636(b)(1)(B) as precluding reference to a magistrate of an entire category of "specific episode" cases. Other courts have referred what appear to be "specific episode" cases to magistrates without commenting on the "condition of confinement" issue.[24]

The case of *Branch v. Martin*, 886 F.2d 1043, (8th Cir. 1989), is most analogous to this case. In *Branch*, a prisoner claimed that prison guards had used excessive force against him on one occasion, but he made no request for a jury trial. *Id.* at 1044. Noting that the term "conditions of confinement" had been interpreted "expansively," *id.* at 1045 n.1, the court did not question the reference to a magistrate under § 636(b)(1)(B).[25] *See McCarthy*, J.A. 65, 906 F.2d at 839 (citing *Branch*).

None of this Court's decisions relied upon by petitioner, Pet. Br. 15, interprets the "conditions of confinement" language in the Magistrates Act, and none supports his position that the words "conditions of confinement" must be limited to ongoing and pervasive practices which lead to actions for injunctive relief only. *Whitley v. Albers*, 475 U.S. 312 (1986), on which petitioner places "particular significance," Pet. Br. 16, does not treat "conditions of

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[22] In *Houghton*, a prisoner challenged the requirement that he wear prison clothing at court proceedings. Arguably, *Houghton* is distinguishable from this case because the claimant was in a mental health facility and thus was "no longer subject to [the] jail clothing rules" and "not seeking damages for an ongoing jail or prison practice." 834 F.2d at 749.

[23] An additional problem in *Hill* was that a jury trial had been demanded. 603 F.2d at 1257.

[24] The Third, Fourth and Sixth Circuits have permitted references to magistrates of prisoner petitions that appear to have alleged "specific episodes" without commenting on the "conditions of confinement" issue. *Goney v. Clark*, 749 F.2d 5 (3d Cir. 1984) (unlawful transfer to solitary confinement); *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980) (claim of excessive force on two occasions); *Roland v. Johnson*, 856 F.2d 764 (6th Cir. 1988) (specific episode of alleged inmate-inmate rape).

[25] The court in *Branch* remanded, however, on the ground that the district judge did not conduct the de novo review required by § 636(b)(1)(B). 886 F.2d at 1045.

confinement" as a unique Eighth Amendment claim,[26] let alone suggest that the substantive standards for an Eighth Amendment case should govern the interpretation of what types of prisoner petitions can be referred to a magistrate under the Act.[27]

II. PETITIONER'S DISTINCTION BETWEEN "SPECIFIC EPISODES" AND CONTINUING CONDITIONS IS UNWORKABLE, WOULD BURDEN DISTRICT COURT JUDGES, AND WOULD LEAD TO UNREASONABLE RESULTS.

Petitioner asserts that the distinction between prisoner petitions alleging a specific episode of unconstitutional conduct and those alleging ongoing unconstitutional practices is "easily drawn." Pet. Br. 18. The opposite is true. The delineation is often blurred, with allegations stemming from a single incident frequently interspersed with allegations of unconstitutional deficiencies in prison policies. In addition, prisoners typically seek both damages and injunctive or declaratory relief in such cases, as petitioner did here.[28]

[26] In *Whitley*, the Court took into account the special circumstances involved in using force to quell a prison riot, but articulated a general standard to apply to prison Eighth Amendment cases:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Whitley, 475 U.S. at 319.

[27] This Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475, 498-500 (1973), which distinguishes habeas actions challenging the fact or duration of confinement from § 1983 actions challenging conditions of confinement generally is more apposite than *Whitley*. *See also Ford v. Estelle*, 740 F.2d 374, 379 n.2 (5th Cir. 1984).

[28] *E.g.*, *Wimmer v. Cook*, 774 F.2d 68, 69 (4th Cir. 1985); *Orpiano v. Johnson*, 687 F.2d 44, 45 (4th Cir. 1982).

Even this case, which petitioner casts as "a single episode of unconstitutional conduct directed exclusively at him," Pet. Br. 10, could better be described as a challenge to an ongoing condition of confinement. McCarthy alleged that the use of tear gas in a single incident constituted excessive force, but he also alleged unconstitutional deficiencies in ongoing prison policies relating to the use of tear gas in general. J.A. 11-24. Those policies, which were carefully followed by prison officials and which allowed the use of tear gas in this case, *see pp.* 2-4 *supra*, continued in effect. There is little question that, if similar circumstances occurred again, tear gas would have been used against McCarthy or other prisoners pursuant to those continuing policies. Petitioner specifically sought injunctive relief requiring a more restrictive tear gas policy, and had he succeeded on the merits of his Eighth Amendment claim, he might well have been entitled to such relief.[29] Arguably, then, this case even falls within Judge Swygert's definition of challenges to "ongoing prison practices and regulations with regard to matters such as . . . cruel and unusual punishment by prison authorities." *Hill*, 603 F.2d at 1260.

In any event, it is clear that if the reference to a magistrate under § 636(b)(1)(B) were dependent on the "single episode" versus "ongoing practices" distinction urged by the petitioner, district judges would frequently be uncertain as to which cases could be referred.[30] This uncertainty would

[29] *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), relied upon by petitioner, does not stand for the proposition that injunctive relief is never available in specific episode cases. It was unavailable in that case because the plaintiff, who was subject to a choke hold when stopped by police for a traffic violation, could not show a real or immediate threat that he would be wronged again in the same way. When a prisoner like McCarthy remains in a prison subject to a continuing prison policy, injunctive relief may be appropriate.

[30] The courts have already reached conflicting conclusions. *Compare Clark v. Poulton*, 914 F.2d at 1430 (two episodes of alleged excessive force not a "condition of confinement") *with Branch v. Martin*, 886 F.2d 1043, 1045 n.1 (8th Cir. 1989) (assault on one occasion is condition of confinement); *and Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990) (assault on two occasions is condition of confinement).

be compounded by petitioner's additional proposed requirement that, to be a "condition of confinement," an ongoing practice must "generally affect[ ] at least a segment of the prison population as a whole." Pet. Br. 18.

District court judges would have to conduct a preliminary inquiry just to determine whether a prisoner petition could be referred to a magistrate.[31] Not only would this impose an extra burden on judges, but the stakes of such a preliminary determination would be extremely high. The court in *Clark v. Poulton* held, relying on *Gomez v. United States*, 109 S. Ct. 2237 (1989), that it was jurisdictional error to refer to the magistrate "specific episode" claims. Consequently, if a trial court were to conclude erroneously that a "continuing condition" was at issue, this error would be jurisdictional and could be raised for the first time on appeal. If the court of appeals subsequently held that only a "specific episode" was involved and that the magistrate was therefore without jurisdiction, all of his efforts would have been wasted. Such an interpretation makes no sense and would result in a squandering of judicial resources.

Moreover, as the dissent in *Poulton* forcefully pointed out, excluding all "specific episode" cases from § 636(b)(1)(B) would not lead to a sensible division of responsibilities between judges and magistrates:

> According to the majority, a suit alleging that a prisoner was beaten once must be heard by an Article III judge, but a claim that the prisoner is beaten daily may be referred to a magistrate. Limiting the magistrate's jurisdiction to the more serious claim makes no sense, and nothing in the legislative history persuades me that Congress intended such an anomaly. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."). Their interpretation conflicts with the legislative intention to give magistrates broad authority to assist judges. *See* H.R. Rep. No. 1609, 94th Cong., 2d Sess. 6-8, *reprinted in* 1976 U.S. Code Cong. & Admin. News, 6162, 6166-68.

Poulton, 914 F.2d at 1435.

Under petitioner's approach, the types of cases that clearly could be referred to a magistrate pursuant to § 636(b)(1)(B) are class actions and other sweeping challenges to prison conditions and practices seeking injunctive relief. *See* Pet. Br. 26. But it makes no sense to require that federal district judges themselves hear every case in which a prisoner has a complaint about his individual treatment, even where no Seventh Amendment right is involved, and assign to magistrates the biggest and most significant prison cases.[32] Contrary to petitioner's assertion, it is virtually inconceivable that Congress intended this nonsensical division of labor. *See* pp. 14-18 *supra*.

The most reasonable and workable interpretation of the phrase "conditions of confinement" is the one adopted by the Second Circuit to include "all grievances occurring during prison confinement." J.A. 65-66; 906 F.2d at 839. This interpretation is supported by the statutory text and legislative history. It does not undercut the Seventh Amendment

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[31] Frequent amendments, under the liberal test of Fed. R. Civ. P. 15, could complicate this process further.

[32] Many individual cases may be important, but there are notorious examples of prisoners who bring repetitive and often frivolous actions against prison officials challenging various aspects of their treatment. *E.g.*, *Green v. Wyrick*, 428 F. Supp. 732 (W.D. Mo. 1976) (prisoner filed hundreds of lawsuits against prison authorities); *see Cleavinger v. Saxner*, 474 U.S. 193, 203 (1985) (Rehnquist, J., dissenting) (noting prisoners are "prolific litigants" who filed over 18,000 § 1983 and *Bivens* suits in 1984).

rights of prisoners, who can assert and preserve their right to a jury trial, and it best serves Congress's purpose of easing the burden of prisoner cases on federal district judges.

CONCLUSION

The judgment of the Courts of Appeals for the Second Circuit in the case below should be affirmed.

Respectfully submitted,

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No. 90-5635

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

JOHN J. McCARTHY,
Petitioner,

v.

GEORGE BRONSON, WARDEN, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

APPENDIX

APPENDIX

Pertinent Statutory Provisions

28 U.S.C. § 636

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings of recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

28 U.S.C. § 636

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may

exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.